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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

ANIBAL RODRIGUEZ, SAL CATALDO,
 JULIAN SANTIAGO, and SUSAN LYNN
 HARVEY individually and on behalf of all
 other similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 3:20-cv-04688-RS

**REPLY IN SUPPORT OF PLAINTIFFS'
 MOTION FOR RELIEF FROM CASE
 MANAGEMENT SCHEDULE**

Judge: Honorable Richard Seeborg
 Date: December 1, 2022
 Time: 1:30 p.m.
 Place: Courtroom 3 - 17th Floor

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1 **I. INTRODUCTION**

2 Google strains mightily to absolve itself from blame, but it remains uncontested that while
3 the discovery deadline has elapsed, the need for additional discovery remains. Seven discovery
4 motions are pending, one of which requests a Special Master to facilitate the production of WAA-
5 off data Google refuses to provide (information important to understanding how Google collects,
6 stores, and uses data). Google is re-reviewing more than 2,000 withheld documents to correct
7 deficiencies in its privilege log, and Google may be ordered to produce thousands more. Two
8 additional depositions are currently scheduled, Plaintiffs have requested at least four more, Google
9 still has not answered critical questions stemming from depositions taken in October, and on the
10 day this Reply is being filed, Google made yet another document production.

11 Google's suggestion that Plaintiffs lacked diligence in discovery is absurd. Plaintiffs have
12 filed 25 letter briefs (including 15 motions to compel), participated in countless meet and confers
13 to push Google to provide critical and highly relevant discovery, and have persistently reviewed
14 tens of thousands of documents that Google belatedly produced. Google can point to nothing
15 suggesting Plaintiffs delayed in raising discovery disputes as they were identified, scheduling meet
16 and confers, exchanging letter briefs on disputed issues, filing motions to compel as necessary,
17 scheduling and taking depositions, or reviewing documents.

18 Meanwhile, for its part, Google consistently hid the ball on relevant discovery, artificially
19 limited the scope of discovery for months, and slow rolled the production of documents. Plaintiffs
20 brought these issues to the Court's attention, which ultimately resulted in a six-month discovery
21 extension and granting of multiple motions to compel. Yet, despite this Court granting a six-month
22 extension and ordering Google to produce documents from 19 additional custodians, Google did
23 not produce a *single* unique document from these custodians until July 2022. Dkt. 180; Dkt. 184.
24 In other words, it took Google longer than the entirety of Court-ordered, six-month extension to
25 produce a single unique document from custodians added by court order. This delay naturally (and
26 likely by design) had a cascading effect, leaving Plaintiffs only three months (and only after
27 stipulating to an extension) to review thousands of documents, send follow-up questions and
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1 discovery requests, determine who to depose, schedule and take those depositions, then send
 2 follow-up requests from those depositions, all while identifying and litigating discovery disputes
 3 stemming from Google’s refusal to produce relevant information.

4 The rules of civil procedure designed discovery as a tool to uncover truth. “The basic
 5 philosophy underlying this procedure was that prior to trial every party to a civil action is entitled
 6 to the disclosure of all relevant information in possession of any person, unless the information is
 7 privileged.” 8 Fed. Prac. & Proc. Civ. § 2001 (3d ed.). Yet Google has consistently weaponized
 8 discovery to obfuscate the truth. This Court should not accept Google’s invitation to reward such
 9 tactics. Plaintiffs respectfully request the Court grant this modest extension.

10 **II. FACTUAL BACKGROUND**

11 The gravamen of Google’s opposition is premised on Plaintiffs’ purported failure to raise
 12 discovery issues sooner. But this bottleneck of issues at the end of discovery is largely traceable
 13 to Google’s own delay in producing documents. On May 4, 2021, the Court ordered Plaintiffs to
 14 review documents from three custodians, then use their findings to recommend additional
 15 custodians. Dkt. 106. Plaintiffs did so and recommended 19 additional custodians, which Google
 16 opposed. On November 22, 2021, the Court found Plaintiffs had “diligently pursued discovery,
 17 and that good cause exist[ed] for a six-month extension of the discovery deadlines,” moving the
 18 fact-discovery deadline from January to July 13, 2022. Dkt. 180. The Court likewise ordered
 19 Google to produce documents for the 19 additional custodians. Dkt. 184. While Google touts the
 20 fact that it produced documents during this time, in reality Google *failed to produce a single*
 21 *unique document* from these 19 custodians until July 28, 2022—after the six-months extension
 22 granted by the Court passed. Dkt. 255-2 ¶ 6; Dkt. 180; Dkt. 208.

23 Google argues this is because the Court did not issue a final decision on search terms until
 24 May 9, 2022. Opp. at 11; Dkt. 238. But Google conveniently omits the parties agreed to many
 25 search terms for the additional 19 custodians as early as January 14, 2022—almost *four months*
 26 *earlier*. See Mao Decl. ¶ 3. Nothing prevented Google from rolling productions based on these
 27 agreed-to search terms. Instead, Google waited until months after *all* search terms were finalized
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1 before producing a single unique custodial document. This left Plaintiffs with only three months
2 to evaluate thousands of highly-technical documents and important communications, serve follow-
3 up document requests, identify deponents and schedule depositions based on these documents, and
4 address issues that arose during depositions. Plaintiffs foresaw this could not all be done by the
5 end of October, and in July proposed extending the discovery deadline beyond that date. Mao Decl.
6 ¶ 5. Google refused to extend discovery beyond the end of October, instead suggesting Plaintiffs
7 should do what they can with the little time they had. Mao Decl. ¶ 5. Google now seeks to unfairly
8 gain an advantage stemming from its own delay.

9 **III. ARGUMENT**

10 Google for the second time misstates the applicable legal standard. Opp. at 5; Dkt. 177 at
11 6. The Rule 16(b) good cause standard “primarily considers the diligence of the party seeking
12 amendment,” and the “court may modify the pretrial schedule if it cannot reasonably be met *despite*
13 *the diligence* of the party seeking the extension.” *Johnson v. Mammoth Recreations, Inc.* 975 F.2d
14 604, 609 (9th Cir. 1992) (emphasis added). There is no dispute that the fact discovery deadline
15 “cannot reasonably be met.” *Id.* More than two weeks have passed since the deadline expired and
16 numerous discovery issues remain despite Plaintiffs’ diligence. This warrants a modest extension
17 of the discovery deadlines.

18 **A. An Extension Is Warranted to Complete Discovery**

19 Google erroneously claims that open discovery “items” necessitating an extension are
20 either resolved or moot. Opp. at 3–5. This is untrue. Those seven items Google identified remain
21 in dispute and require follow-up. The same is true with additional items Google simply ignores.
22 Plaintiffs list below numerous remaining issues before addressing Plaintiffs’ diligence in obtaining
23 highly relevant discovery and Google’s obstruction of these efforts.

24 ///

25 ///

26 ///

Item	Google's Statements on Status	Actual Status
1. Data relating to "Google's storage and use of WAA-off data."	<p>"Letter Brief at Dkt. 250 (pending) (supplemental briefing at Dkt. 253)." Opp. at 4.</p> <p>"Plaintiffs have long known Google's position on this specific data, and chose to wait to seek relief on this subject until seven days after discovery closed." Opp. at 4.</p>	<p>Plaintiffs requested WAA-off data in May 2022. Dkt. 250 at 1. Plaintiffs attempted to resolve this issue through multiple meet and confers but ultimately filed three letter briefs in pursuit of this data. Dkt. 250 at 1. On November 7, 2022, Plaintiffs requested a Special Master to oversee production of WAA-off data. Dkt. 260. If granted, discovery will continue.</p>
2. Depositions of Dan Stone and Rahul Oak	<p>"Scheduled for Nov. 15 and Nov. 18." Opp. at 4.</p>	<p>These depositions were scheduled after the close of fact discovery due to the witnesses' unavailability, including Mr. Oak who traveled to India for over a month after Plaintiffs requested his deposition.</p> <p>Plaintiffs anticipate requesting additional information following Mr. Oak's deposition.</p>
3. Rule 30(b)(6) Deposition of Belinda Langner	<p>"Scheduled for mid-November" Opp. at 4.</p>	<p>This deposition has been scheduled for November 30, 2022, after the close of fact discovery because Google belatedly substituted Ms. Langner as a 30(b)(6) designee. Mao Decl. ¶ 12.</p> <p>Plaintiffs anticipate requesting additional information following Ms. Langner's deposition.</p>
4. Plaintiffs' Ninth Set of RFPs (referred to as "Google Documents" on page 6 of the Motion)	<p>"Resolved by the parties in compromise on Nov. 7." Opp. at 4.</p>	<p>While Google agreed to produce documents responsive to this set of RFPs, it still has not done so. Mao Decl. ¶ 11. Once Google produces documents, Plaintiffs will require an opportunity to analyze those documents and follow up on any issues that arise.</p>

Item	Google's Statements on Status	Actual Status
<p>5. Plaintiffs' request for four additional depositions</p>	<p>"Letter Brief at Dkt. 256 (pending)." Opp. at 4.</p> <p>"Plaintiffs waited to ask for their depositions until the last possible day, on Nov. 7." Opp. at 4.</p>	<p>Plaintiffs requested these depositions and offered to meet and confer on September 28, 2022, not November 7, 2022. Mao Decl. ¶ 6. Google refused. Plaintiffs sent Google their portion of the letter brief on October 6, 2022. Mao Decl. ¶ 6. The parties filed the brief on October 28, 2022. Dkt. 256.</p> <p>If granted, Plaintiffs will need an opportunity to take these depositions and follow up with any discovery issues that arise.</p>
<p>6. Google's Privilege Log Deficiencies (referred to as "Google Privilege Assertions" on page 7 of the Motion)</p>	<p>"Resolved by the parties in compromise on Nov. 7." Opp. at 5.</p>	<p>This item is still in dispute. Google agreed only to "re-review" the privilege log. Opp. at 5.</p> <p>Plaintiffs will require an opportunity to review any de-designated documents and to file letter briefs if any disputes remain on improperly withheld documents.</p>
<p>7. Documents and Depositions of Micha Segeritz, Suneeti Vakharia, and Emil Ochotta (referred to as "Google Revenue Impact for WAA Controls" on page 7 of the Motion)</p>	<p>"Letter Brief at Dkt. 261 (pending)." Opp. at 5.</p> <p>"[Plaintiffs] did not move to compel further productions</p>	<p>Plaintiffs became aware of Mr. Segeritz and Ms. Vakharia on October 3, 2022, and promptly requested their documents on October 7, 2022. Dkt. 261 at 1–2; Mao Decl. ¶ 7. Google denied that these individuals had relevant information. Dkt. 261 at 2. On October 25, 2022, Plaintiffs gained new information suggesting that Google was mistaken. Dkt. 261 at 2. Plaintiffs sent Google its portion of a letter-brief on November 1, 2022. Dkt. 261 at 1.</p> <p>If the Court grants Plaintiffs' motion, Plaintiffs will need an opportunity to analyze produced</p>

Item	Google's Statements on Status	Actual Status
	until the last possible day. Google opposes the request.” Opp. at 5.	documents, take depositions, and address any issues that arise.
8. Documents provided to regulators	Unmentioned.	On November 7, 2022, the parties filed a letter brief in which Plaintiffs request Google to produce documents provided to regulators. Dkt. 262. If granted, Plaintiffs will need an opportunity to review these productions and address any issues that arise.
9. Documents relating to Pr*** Na*** program.	Unmentioned.	On November 7, 2022, the parties filed a letter brief wherein Plaintiffs requested Google produce documents relating to a Google program called Pr*** Na***. Dkt. 264. If granted, Plaintiffs will need an opportunity to analyze these productions and address any issues that arise.
10. Requests for Admission and Interrogatories	Unmentioned.	On November 7, 2022, the parties filed a letter brief in which Plaintiffs requested Google respond to ten RFAs and three Interrogatories. Dkt. 263. If granted, Plaintiffs will need an opportunity to analyze these answers and address any issues that arise.
11. Interrogatory and RFA responses and supplementations.	Unmentioned.	On October 31, 2022, Google served responses to RFAs and interrogatories. Mao Decl. ¶ 8. Plaintiffs are currently evaluating this information and determining whether any issues need to be addressed.
12. Requests following Steve Ganem Deposition	Unmentioned.	On October 31, 2022, Plaintiffs requested information revealed during Mr. Ganem's deposition. Mao Decl. ¶ 9. Plaintiffs requested additional information on November 7, 2022. Mao Decl. ¶ 9. Google has not yet responded to either request. <i>See</i> Mao Decl. ¶ 9.

Item	Google's Statements on Status	Actual Status
13. Request following Francis Ma Deposition	Unmentioned.	On October 31, 2022, Plaintiffs requested information revealed during Mr. Ma's deposition. Mao Decl. ¶ 9. Google has yet to respond.

Documents & Data: Items 1, 4, 6, 7, 8, & 9. Google must still produce documents in response to Plaintiff's Ninth Set of RFPs, any documents it de-designates from privilege, and any documents or data the Court compels Google to produce in connection with Plaintiffs' various motions to compel. Indeed, Google continues to produce documents outside the discovery period, including a production the same day as this filing. *See* Mao Decl. ¶ 10. Plaintiffs will need additional time to review any newly produced discovery, which might reveal important information necessitating follow up. *See Kahaku v. Wallace*, 2022 WL 2333725, at *13 (E.D. Cal. June 28, 2022) (extending discovery deadline where Plaintiff may "need additional time to review any documents provided" following privilege review). Without an extension of the discovery deadline, Plaintiffs will be deprived of the opportunity to address any new issues that arise in these productions.

Responses and Admissions: Items 10 & 11. On November 7, 2022, Plaintiffs filed a letter brief requesting Google respond to ten RFAs and three interrogatories. Dkt. 263. If this request is granted, Plaintiffs will require time to review Google's responses and—if necessary—request follow up or raise objections. Plaintiffs are also continuing to review and consult with technical experts on the interrogatory and RFA responses Google served on October 31, 2022.

Depositions: Items 2, 3, 5, 7, 12 & 13. There are myriad outstanding issues pertaining to both past and upcoming depositions in this case. Two additional depositions are scheduled to occur after this Reply is filed, and four more may potentially take place. These will likely require follow-up given the technical nature of the topics to be covered. Furthermore, Google still owes Plaintiffs answers to questions posed after depositions taken in October 2022. Shortly after deposing Francis Ma and Steven Ganem, Plaintiffs emailed Google a list of follow-up questions bearing on the adequacy of Google's productions and discovery responses. Mao Decl. ¶ 9. A week later, Plaintiffs

1 emailed Google again requesting this information and posing further questions. Mao Decl. ¶ 9 To
2 date, Google has neither acknowledged receipt of these emails nor provided answers to these
3 questions. Mao Decl. ¶ 9. If Google is this reluctant to answer questions posed *before* fact
4 discovery ended, conducting follow up on these matters *after* the close of discovery appears
5 impossible. Such discovery gamesmanship should not be allowed. *See Hernandez v. Creative*
6 *Concepts*, 2013 WL 1737211, at *6 (D. Nev. Apr. 22, 2013) (extending discovery deadlines where
7 depositions were scheduled after the discovery deadline and “follow-up discovery may be
8 required”).

9 While these discovery disputes remain open, Plaintiffs are still faced with expert disclosure
10 deadlines. Currently, Plaintiffs’ opening expert disclosures are due January 20, 2023. Dkt. 246.
11 Plaintiffs are working with their experts to meet this deadline, but any additional information that
12 Google is compelled to provide, is gleaned from the outstanding depositions, or Google provides
13 through supplemental discovery responses, will likely impact those expert disclosures and the
14 opinions those experts will offer. Had Google completed its discovery obligations by October 31,
15 2022 (completing all depositions, document productions, and supplemental discovery responses)
16 then Plaintiffs’ experts could have proceeded with the case schedule as ordered by the Court. But
17 Google slow-rolled productions, delayed witnesses’ depositions, and still has not answered the
18 bulk of outstanding requests from Plaintiffs—mostly now requiring this Court’s attention. The
19 holidays are approaching, and Google’s delay has further prejudiced Plaintiffs and their experts by
20 continuing to hinder discovery efforts that impact expert work.

21 Lastly, Google will not be prejudiced by Plaintiffs’ proposed extension. No trial date is
22 currently set, and Google “will be afforded sufficient time to respond to any permitted discovery.”
23 *Calloway v. Scribner*, 2014 WL 1317608, at *4 (E.D. Cal. Mar. 27, 2014); *see also Woodard v.*
24 *City of Menlo Park*, 2012 WL 2119278, at *1–2 (N.D. Cal. June 11, 2012) (reopening discovery
25 and noting that “any prejudice suffered by Defendant in this regard is substantially outweighed by
26 Plaintiff’s need to engage in discovery to adequately prepare for trial”).

1 **B. Plaintiffs Have Diligently Pursued Discovery**

2 Plaintiffs have gone to great lengths to obtain discovery in this highly technical case and
3 have not (as Google alleges) been tardy in doing so. Google’s Opposition claims Plaintiffs are late
4 in requesting (1) an extension, (2) WAA-off data, (3) additional documents, and (4) additional
5 depositions. As described below, however, Google—not Plaintiffs—is responsible for the timing
6 of Plaintiffs’ requests.

7 First, Plaintiffs’ extension request is not untimely. As discussed above, Google failed to
8 produce a single unique document from 19 custodians until July 2022. Plaintiffs made clear to
9 Google for months that the October 31st fact-discovery cut off was insufficient because of Google’s
10 delay in producing these relevant documents. Despite the delays, Plaintiffs have tirelessly worked
11 around the clock to review documents, identify issues for follow up, prepare letter briefs, and take
12 depositions. Plaintiffs did not “delay” by seeking to resolve this issue with Google directly before
13 raising this issue with the Court. In fact, these efforts reflect that Plaintiffs were diligent. *See In re*
14 *Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 WL 5462496, at *10 (N.D. Cal. Oct. 23, 2014)
15 (“the Court certainly cannot conclude [Plaintiffs] were not diligently pursuing discovery when
16 they were, in fact, making an effort to resolve these issues without pursuing them before the Special
17 Master or the Court”).

18 Nor are Plaintiffs late in requesting WAA-off data. Google proffers that the “most
19 egregious example” of Plaintiffs’ delay is waiting to request a Special Master and the Court to
20 compel Google to produce WAA-off data “until seven days after discovery closed.” Opp. at 5, 7.
21 Google conveniently omits the *six months* of back and forth that necessitated that briefing. On
22 May 27, 2022, Plaintiffs served discovery requests seeking more information on WAA-off data.
23 *See* Mao Decl. ¶ 4. This data is highly relevant to apportion damages and for class administration.
24 Understanding the importance of this data, Google did not respond to these requests until *nearly*
25 *two months* later on July 13, 2022. *See* Mao Decl. ¶ 4. On August 31, 2022, Plaintiffs sent Google
26 a letter brief requesting this data, and on September 1, 2022, the parties met and conferred, and
27 Google mentioned it identified WAA-off bits in thousands of logs and was still “investigating”
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1 these bits. *See* Mao Decl. ¶ 4. Google waited ***over a month*** before sending back its portion on
2 October 4, 2022. *See* Mao Decl. ¶ 4. The letter brief was finally submitted to the Court on October
3 17, 2022, and Plaintiffs submitted additional briefing per Judge Tse’s order on October 26, 2022.
4 *See* Dkt. 250; *see also* Dkt. 253. Plaintiffs’ request for a Special Master is the third—not first—
5 brief on this issue, which was only delayed because, in typical fashion, Google spent months
6 “investigating” logs that contain WAA-off data just to identify which logs contain WAA-off bits,
7 without actually producing anything. *See* Mao Decl. ¶ 4. Production of these logs is important
8 since the logs represent real-world evidence of what Google does with WAA-off data, how it
9 collects that data, how it stores that data, and how it uses that data. The Court in *Brown v. Google*
10 *LLC*, No. 4:20-cv-03664-YGR (N.D. Cal.) and *Calhoun v. Google LLC*, No. 4:20-cv-05145-YGR
11 (N.D. Cal.) recognized the importance of precisely this type of discovery and appointed a Special
12 Master to facilitate production from similar logs.

13 Plaintiffs also diligently requested additional depositions. They did not “wait[] until the
14 last possible day, Nov. 7” to seek them. *Opp.* at 4. Plaintiffs initially requested the additional
15 depositions in September, well before the discovery deadline. *See* Dkt. 255-2 ¶ 9. They then sent
16 Google a letter brief on this issue on October 6, 2022. *See* Mao Decl. ¶ 6. On October 17, 2022,
17 Google sent its portion of the letter brief and, after edits from both sides, the parties filed the final
18 letter brief on October 28, 2022, before the close of fact discovery. *See* Mao Decl. ¶ 6; *see also*
19 Dkt. 256.

20 Finally, Plaintiffs persistently requested additional documents. Google again
21 mischaracterizes events to make it appear Plaintiffs waited “until the last possible day” to request
22 documents from Micha Segeritz, Suneeti Vakharia, and Emil Ochotta. Not so. On October 3, 2022,
23 these first two individuals became known to Plaintiffs for the first time during (former Google
24 employee) Greg Fair’s deposition, where he identified these individuals as the Google employees
25 who worked on WAA-off revenue analyses, which is clearly relevant to damages in this case. *See*
26 Dkt. 261 at 1. Plaintiffs had pursued this precise information for months, and once finally armed
27 with these specific individuals’ involvement, Plaintiffs promptly requested these witnesses’
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1 custodial documents on the following Monday (October 7, 2022). Mao Decl. ¶ 7. On October 19,
2 2022 (with Google’s usual delay of nearly two weeks) Google denied this request without
3 providing any substantive reason. Dkt. 261 at 2. Seeking to avoid dispute, Plaintiffs then requested
4 Google run a *single* search term for documents held by these individuals and produce responsive
5 documents. Dkt. 261 at 2. On October 24, 2022, Google denied this second request, leaving
6 Plaintiffs no choice but to file a letter brief on November 7, 2022. Dkt. 261 at 2.

7 **C. Google Has Caused Delay**

8 Unable to justify its consistent delays, Google instead claims the Rule 16(b) good cause
9 standard “does not take into account supposed delay on the part of the non-movant.” Opp. at 5.
10 While it is obvious why Google would want the Court to ignore Google’s discovery tactics in this
11 case, Google is wrong on the law. “When the modification [of a Scheduling Order] is necessitated
12 by acts of the opposing party or by the opponent’s failure to act, relief has also been deemed
13 appropriate.” 6A Fed. Prac. & Proc. Civ. § 1522.2 (3d ed.). Indeed, courts have repeatedly found
14 good cause to extend deadlines where, despite the moving party’s diligence, the nonmoving party
15 stalls discovery—just like Google has here. *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 (9th
16 Cir. 2007) (finding district court abused discretion in refusing to extend discovery deadline to
17 allow movant to depose a central witness made unavailable by opposing party); *Saca v. Molyneux*,
18 2007 WL 4524329, at *2 (E.D. Cal. Dec. 18, 2007) (extending schedule by 3 months where
19 plaintiff was diligent but defendant delayed discovery and depositions had to be pushed to later
20 dates); *United States v. Dalton*, 2021 WL 9526878, at *1, 2 (C.D. Cal. Oct. 19, 2021) (extending
21 schedule by 4 months because “despite the [plaintiff’s] diligent efforts, the current deadlines could
22 not be reasonably met” where defendants delayed discovery, including by “provid[ing] evasive
23 and incomplete responses to interrogatories and document requests, assert[ing] improper
24 objections, [and] ma[king] ambiguous privilege assertions”). Because of Google’s habit of delay,
25 completing discovery before the October 28th deadline was—and remains—impossible. An
26 extension is warranted.

1 **IV. CONCLUSION**

2 Plaintiffs respectfully request the Court grant this modest extension.

3 Dated: November 17, 2022

Respectfully submitted,

4
5 /s/ Mark C. Mao

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